INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	8
Conclusion	14

CITATIONS

Cases:

Black v. *United States*, 385 U.S. 26	11
Brady v. *Maryland*, 373 U.S. 83	5
Carbo v. *United States*, 314 F.2d 718, certiorari denied *sub nom. Palermo* v. *United States*, 377 U.S. 953	10
Dennis v. *United States*, 384 U.S. 855	11
Jencks v. *United States*, 353 U.S. 657	11
Pereira v. *United States*, 347 U.S. 1	13

Statutes:

18 U.S.C. 875(c)	2, 12
18 U.S.C. 3500	11

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 133

RUBY KOLOD, WILLIE ISRAEL ALDERMAN AND FELIX ANTONIO ALDERISIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 371 F. 2d 983.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1967. A petition for rehearing was denied on March 8, 1967. On March 22, 1967,

Mr. Justice White extended the time for filing a petition for a writ of certiorari to May 7, 1967. The petition was filed on May 5. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court, after an *in camera* inspection of the records of eavesdropping by government agents, properly ruled that the government had not suppressed any exculpatory evidence.

2. Whether the trial court, acting pursuant to a limited remand by the court of appeals, properly confined the hearing to issues within the scope of the remand order.

3. Whether the court's instructions failed to apprise the jury of an essential element of the offense charged.

4. Whether the court of appeals, in finding the evidence sufficient to support the conviction of petitioner Alderisio, improperly considered evidence presented by a co-defendant.

STATEMENT

Petitioners were convicted in the United States District Court for the District of Colorado of conspiracy to transmit in interstate commerce communications containing threats to injure and murder one Robert Sunshine in violation of 18 U.S.C. 875(c). It was alleged that between May 15, 1961, and July 6, 1961, eight overt acts were commited in furtherance of the conspiracy. Kolod was sentenced to imprison-

ment for four years and fined $7,500; Alderman was sentenced to three years and fined $5,000; and Alderisio was sentenced to four and one-half years and fined $7,500.

1. The sufficiency of the evidence to prove a conspiracy to transmit threatening communications is not challenged here, although Alderisio raises a question as to the evidence relating to him. In brief, the evidence shows that in June 1959 petitioner Kolod, an officer of the Desert Inn in Las Vegas, and petitioner Alderman invested $78,150 in an oil lease venture with Robert Sunshine, a Denver attorney (1 R. 25-30).[1] In October 1960, Kolod and Alderman voiced displeasure with the transaction. Alderman told Sunshine that if he did not get his money back in full he would collect it without resort to "normal collection methods" (1 R. 38-39).

In the spring of 1961 there was a series of long-distance telephone conversations from Kolod and Alderman in Las Vegas to Sunshine in Denver about the invested money. In these calls, Kolod inquired whether Sunshine was aware of Alderman's background and said that he was fearful of what might happen to Sunshine if the matter was not resolved (1 R. 41, 45-46). On May 11, 1961, Alderman told Sunshine that "he was going to send a lawyer" to see him unless the matter was settled (1 R. 47-48). On May 16, a check for $16,600 was issued to Alderisio

[1] "R." refers to the transcript of the trial proceedings. "Tr." refers to the hearing held after the case was remanded by the court of appeals.

by the Desert Inn in exchange for cash presented by Kolod (2 R. 353-354). The next day Kolod imposed a 30-day deadline on the return of the $78,150 (1 R. 49). An extension was refused. In a conversation in June both Kolod and Alderman told Sunshine that a "lawyer from Chicago" would take care of him and would not be there for the purpose of filing a lawsuit (1 R. 52-53).

On July 6, 1961, petitioner Alderisio and Americo DePietto visited Sunshine in his Denver office. Alderisio said, "Ruby sent us. We came here to kill you," and boasted that he could easily kill Sunshine or a member of his family. Sunshine persuaded Alderisio to listen to his side of the transaction. Kolod, who was reached by telephone in New York, agreed to meet with Sunshine in Las Vegas, but warned Sunshine that if Alderisio returned he "would simply take care of the job." Alderisio reiterated this warning (1 R. 56-59, 69). In August 1961, Sunshine agreed to repay Kolod and Alderman in installments. Pursuant to this agreement, a series of checks was sent to Kolod and Alderman (1 R. 60, 62-68; 2 R. 206). In February 1962, in the course of an interstate telephone conversation relating to some checks returned for insufficient funds, Kolod warned Sunshine that he might have to send Alderisio again (1 R. 71).

In the spring or early summer of 1962, Kolod told Sunshine in a telephone conversation that, before he went on a trip to Europe, he wanted to tell Alderisio that the money had been paid. Later, Alderman told

Sunshine that he could avoid another visit from Alderisio if he paid the money before Kolod returned from Europe. In the early fall of 1962, Kolod telephoned from New York and repeated that they wanted their money back plus a one-third profit. Shortly thereafter, Kolod called again and gave Sunshine until the first of the year to pay up in full (1 R. 71-72, 160-163). In December 1962, after embezzling funds from his clients, Sunshine traveled to Las Vegas where he unsuccessfully attempted to borrow money from Kolod (1 R. 72-73).

2. Alderman and Kolod testified in their own defense. Alderman denied that he had threatened Sunshine (3 R. 440, 446), saying that his telephone conversations with Sunshine in 1961 had been innocuous (3 R. 442, 456, 461-462) and that he had had no telephone conversations with him in 1962 (3 R. 444-445). Kolod denied that he had threatened Sunshine (2 R. 328). He said that he usually talked to Sunshine after a check was returned unpaid. He testified that in 1961 and 1962 his conversations with Sunshine were conducted over the telephone in the executive office of the Desert Inn (2 R. 328).

After Kolod testified, petitioners called as a witness a private detective who had investigated the Desert Inn executive office in August 1963. When the government objected, petitioners, relying upon *Brady* v. *Maryland*, 373 U.S. 83, offered to prove that a listening device installed in this room between March 22, 1962, and August 1963 had carried every conversation to F.B.I. headquarters, and argued that

the F.B.I. thus had information showing that Kolod had never threatened Sunshine over this telephone (3 R. 403-417).[3] The government replied that it had no record of any overheard conversations between Kolod and Sunshine. Petitioners claimed that this created an issue of credibility for the jury as to what conversations were recorded and that they were entitled to a full hearing on the subject of whether the agents had heard any conversations in which Mr. Kolod was involved in the conference room (3 R. 428-429). The trial judge ruled that testimony about the listening device was irrelevant unless the government files contained something that would either establish the innocence of the defendants or affect the credibility of Sunshine (3 R. 429-430). The court then inspected the files and found no reference to conversations between Kolod and Sunshine and "no reference to the matter on trial" (3 R. 479). Petitioners contended that the absence of anything in the files "demonstrates that there were no threatening calls made over the telephone from that office" and "demonstrates exculpation here on the part of the defendant Kolod who used the telephone" (3 R. 481). Their request for a hearing on a proffer of proof (3 R. 412-418, Pet. 6-7) was denied.

While the case was on appeal, the government informed the court that it had discovered additional files relating to conversations overheard at the Desert Inn. The case was remanded with directions that

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[3] Counsel for Kolod in his proffer accepted the representation by the government that no leads germane to this case were obtained by the eavesdropping (3 R. 407).

the district court examine the additional files *in camera* and allow petitioners to examine the agents referred to in the proffer of proof who had heard the listening device.

The hearing on remand disclosed that the device, located in an office occupied by two men, not defendants in this case (4 Tr. 65), had been installed as part of an investigation into "skimming activities" (money taken from the hotel to avoid the payment of taxes), the names of recipients of money from the hotel and the business contacts of the owners of the hotel (4 Tr. 55-56; 2 Tr. 13-14). The monitoring itself, by 21 monitors, took place at the F.B.I. office in Las Vegas, the sound coming over a single leased line running from the Desert Inn (2 Tr. 8, 11, 21-22; 3 Tr. 8). If voices were heard, a notation would be made in an administrative log showing the type of information received. In addition, a recorder would be turned on to record each pertinent conversation (2 Tr. 12-13, 59, 62; 3 Tr. 12-13, 42-45, 49-51).[3] Later, the special agent assigned to the case would listen to the recorded conversation. He would also examine the administrative log and transcribe all pertinent information "other than conversation about dates or showgirls or golf matches and so forth" (2 Tr. 12, 24-25, 35; 4 Tr. 66).[4] The tape recordings would

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[3] On some occasions, one individual would monitor more than one line. If a voice were heard over another line, the recorder would be turned on (see, *e.g.*, 3 Tr. 54-55).

[4] Originally the trial judge had been given the complete information as transcribed by the case agent but had not been furnished the administrative logs (2 Tr. 27-28).

then be erased (2 Tr. 23). The monitors of the listening devices had been given the names of individuals, including Kolod, who were of particular interest to the investigation, and they were instructed "to enter everything on the log that occurred in that room" (4 Tr. 84; 2 Tr. 37; 3 Tr. 67). Under these instructions, they would have recorded or logged any conversation of Kolod and any conversation involving money, returned checks, oil deals or unknown persons (3 Tr. 44-45, 63-66, 80-81, 115; 4 Tr. 32, 63-64). None of the monitors heard Kolod speak over the telephone, although on several occasions his voice was heard in the office where the listening device was located (2 Tr. 37-38; 4 Tr. 65, 71, 81, 92-93).[5]

At the conclusion of the hearing, the trial judge, who had examined the additional files, found that neither the material nor the subjective knowledge of any of the witnesses who testified showed that Kolod had talked over the telephone in the room involved (5 Tr. 13-18).

ARGUMENT

1. As set forth in the Statement, *supra*, the government's evidence showed that as early as the fall of 1960 petitioners Alderman and Kolod had told Sunshine that they wanted their money back and would not rest content with ordinary methods for its

[5] Kolod's function at the hotel was described as the manager of the casino, which was located in a section of the hotel away from the office with the listening device (4 Tr. 60-61, 71, 73, 87-89).

collection. In May and June 1961 they said they were going to "send a lawyer" to collect. In July 1961, Alderisio visited Sunshine and threatened to kill him. In August 1961 Sunshine agreed to make payments; a total of sixty-six checks thereafter sent were introduced in evidence. In 1962 Kolod, who was in Europe during the summer, called Sunshine several times in the spring (according to Kolod, from Las Vegas), saying that he wanted his money in full before he went to Europe, and again in the fall saying that he wanted his money back in full by the end of the year (1 R. 71-72, 160-161, 162).

The proffer of proof and the records of eavesdropping here in issue concern only the period from March 22 to December 19, 1962.* This was a small and by no means crucial period of the conspiracy. The evidence that the F.B.I. agents had heard no threatening calls from Kolod to Sunshine during this period was properly withheld from the jury, since its relevancy was not established. There was no proof that the agents overheard *any* calls from Kolod to Sunshine, and in the absence of such evidence their testimony that they had heard no threats was obviously not germane. If anything, the evidence of the eavesdropping undermined Kolod's claim that he had made calls during the period in question from the monitored office, not Sunshine's claim that he had received threatening calls from Kolod during this period, since Sunshine did not testify, and could not

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* Sunshine testified that he had not spoken to Kolod after December 19, 1962 (1 R. 159).

know, where the calls were coming from. Accordingly, the question of relevancy—which was clearly one for the court to decide even if it involved preliminary factual determinations (cf. *Carbo* v. *United States*, 314 F.2d 718, 736 (C.A. 9), certiorari denied, *sub nom. Palermo* v. *United States*, 377 U.S. 953)—was properly resolved against petitioners.

Nor was there any unfairness in the procedure adopted for making the determination whether the evidence of eavesdropping would be relevant. The trial court did not simply accept the prosecutor's statement that government agents had not overheard any Kolod-Sunshine conversations. It conducted an independent examination of the government files which summarized and recorded what was overheard, and it found no indication of any telephone conversations between Kolod and Sunshine and indeed no material which related in any way to the matter on trial. The court of appeals, in remanding the case, was not satisfied with that determination; it concluded that appellants had a right to pursue the possibility that the F.B.I. agents had subjective knowledge of the substance of telephone calls made by Kolod (Pet. 10a). The hearing on the motion to remand showed that the agents knew of no Kolod-Sunshine conversations either from objective recordation or from their own recollection. Thus the court properly ruled that the agents had no relevant testimony to offer the jury.

The claim that petitioners were entitled to see the files in order to cross-examine the government agents (Pet. 16-18) is without merit in the circumstances.

Petitioners were claiming that the government was suppressing relevant evidence favorable to the defense. The mere assertion of such a claim does not require that government files be opened up to the defense. The situation may be likened to a dispute over whether material relates to the case on trial within the meaning of 18 U.S.C. 3500. In order to preserve the secrecy of unrelated government files the trial court may properly determine that issue by an *in camera* inspection of the government files. Otherwise, every charge that the government was suppressing relevant material—however insubstantial—would result in sweeping and unjustified disclosure of the contents of confidential governmental files.

Neither *Dennis* v. *United States*, 384 U.S. 855, nor *Jencks* v. *United States*, 353 U.S. 657, is in point; each involved the question whether to disclose to the defense concededly relevant materials. As for the claimed property interest of Kolod in the government's files, surely he has no right to conversations in which he did not participate. Finally, unlike *Black* v. *United States*, 385 U.S. 26, and the cases which have followed it, there is no contention in this case that the government's case is tainted by illegal evidence.

2. Near the close of the hearing on remand, defense counsel asked an agent whether the F.B.I. had "employed any wire tap, listening device, or eavesdropping device in connection with Phil Alderisio at either Hillcrest 7-0664 or Harrison 7-1700." When the government objected that this question was beyond the scope of any activities at the Desert Inn, defense

counsel replied that they were attempting to show that there was a wire tap or listening device on Alderisio during the period of time at issue and that this was "newly discovered". They argued that the government had the burden of disclosing to the court and counsel whether there was a "bug" during this period. The court sustained the objection as being beyond the purpose of the inquiry concerning what had occurred at Las Vegas (4 Tr. 98-99). The court and government counsel acted properly in confining the issue to the inquiry for which the case was remanded. Defense counsel's assertion that he had newly discovered evidence, without specifying any details, did not warrant broadening the hearing to matters not included in the remand.

3. Petitioners contend that the instructions failed to require the jury to find that they conspired and agreed to transmit telephone threats in interstate commerce. An examination of the instructions, however, shows that the jury was adequately charged on this issue. Initially, the jury was instructed that the conspiracy charged was that "the defendants conspired to transmit in interstate commerce threats to injure and murder one Robert Sunshine" in violation of 18 U.S.C. 875(c) (3 R. 493). Thereafter, the court read to the jury the conspiracy statute and 18 U.S.C. 875(c), which makes it a crime to transmit any communication in commerce containing any threat. The court then instructed the jury on the law of conspiracy, setting forth the elements of the offense which they had to find (4 R. 495-496). The court

then instructed on the second count of the indictment. Following this the court told the jury that the transmission of a telephone conversation from one state to another is a communication "within the meaning of the statute upon which the indictment in this case is based" (4 R. 498). As the court of appeals found, nothing in the record suggests that anyone at the trial "had anything but telephone communications in mind" (Pet. 19a). If defense counsel thought that under the instructions the jurors might have convicted defendants of a conspiracy to threaten by interstate travel (Pet. 20), they should have called that possibility to the attention of the trial judge (3 R. 503).

4. Petitioner Alderisio's attempt to transform an attack on the sufficiency of the evidence into a question of law (Pet. 21-23) is without merit. On the government's evidence alone, the evidence was ample to justify the conclusion that Alderisio was aware of the fact that interstate telephone facilities had been and would be used by the other petitioners, who were in Nevada, to make threats to Sunshine, who was in Denver. See *Pereira* v. *United States*, 347 U.S. 1.

The court of appeals did not, as petitioner Alderisio contends, affirm his conviction on the basis of evidence introduced by a co-defendant. Rather, it based its conclusion on facts in the government's case when it stated (Pet. 19a-20a):

> * * * As the very instrument of force by which Kolod and Alderman had persistently assured Sunshine they would carry out their threats, Alderisio was an essential element of the con-

> spiracy. His brief reign of terror in Sunshine's office, coupled with his initiation of an interstate telephone call to Kolod and Alderman in Monticello, New York, was a clear indication of his active participation in and knowledge of the agreement to transmit threats from one state to another. * * *

The other parts of the opinion to which petitioners refer (Pet. 13) are from the court's general statement of the case, not its review of the sufficiency of the evidence to sustain Alderisio's conviction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1967.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 260020 1